Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Message Text

CONFIDENTIAL

PAGE 01 GENEVA 03052 01 OF 04 271448Z
ACTION EB-08

INFO OCT-01 IO-13 ISO-00 L-03 FRB-03 OMB-01 ITC-01
SP-02 USIA-06 AGRE-00 AID-05 CIAE-00 COME-00
INR-10 LAB-04 NSAE-00 OIC-02 SIL-01 STR-07
TRSE-00 CEA-01 SS-15 AF-10 ARA-10 EA-10 EUR-12
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R 271428Z FEB 78
FM USMISSION GENEVA
TO SECSTATE WASHDC 6482
INFO USMISSION USUN NEW YORK

C O N F I D E N T I A L SECTION 01 OF 04 GENEVA 03052

E.O. 11652: GDS
TAGS: UNCTAD
SUBJECT: UNCTAD - CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY - FIFTH INTERGOVERNMENTAL GROUP OF EXPERTS, FEBRUARY 13-24

REF: USUN 5699

1. SUMMARY: INTERGOVERNMENTAL GROUP OF EXPERTS CONTINUED TO MEANDER TOWARD A CODE OF CONDUCT ON TECHNOLOGY TRANSFERS AT SOMETHING LESS THAN BREAKNECK SPEED. IN THE COURSE OF TWO WEEKS NEGOTIATIONS, AT ITS FIFTH SESSION, EXPERTS PRODUCED RELATIVELY UNBRACKETED AGREEMENT ON PART OF THE INTERNATIONAL COLLABORATION SUBCHAPTER. OTHER HIGHLIGHTS INCLUDED THE TABLING BY GROUP B OF A CHAPEAU ON THE RESTRICTIVE BUSINESS CHAPTER (TEXT PARA 6 BELOW) AND AGREEMENT ON A HEAVILY BRACKETED TEXT CLEARLY DISTINGUISHING BETWEEN PRINCIPLES AND OBJECTIVES OF THE CODE. EXPERTS BEGAN CONSIDERATION OF GUARANTEES/ RESPONSIBILITIES CHAPTER WITH NO RESULT, AND ENDURED EXHAUSTIVE DISCUSSIONS OF THE NATIONAL REGULATIONS
CONFIDENTIAL

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PAGE 02 GENEVA 03052 01 OF 04 271448Z

CHAPTER, ALSO WITH NO RESULT. G-77 INTRODUCED INFORMAL REPORT ON INTERNATIONAL MACHINERY WHICH WAS NOT CONSIDERED BY THE SESSION. USDEL MADE LOW KEY STATEMENT IN PLENARY ON CONFERENCE TIMING ALONG LINES OF REFTEL (PARA 9 BELOW). END SUMMARY.

2. ASSESSMENT: FIFTH IGE FAILED TO YIELD DRAMATIC BREAK-

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

THROUGHS ON MAJOR ISSUES BUT CONTINUED MODERATE PROGRESS ON LESS CRITICAL ASPECTS OF CODE. B GROUP PRESERVED CONSENSUS ON ALL ISSUES ALTHOUGH DISCUSSIONS OF RBPS WERE FREQUENTLY HEATED. G-77 GAVE STRONG BUT PRIVATE INDICATIONS THAT DELEGATES MAY BE HAVING SECOND THOUGHTS ABOUT A LEGALLY BINDING STATUS FOR ENTIRE CODE GIVEN B GROUP INSISTENCE ON QUALIFYING PROVISIONS WHICH LDCS WOULD NOT WISH CONTAINED IN SUCH A DOCUMENT. THIS IS PARTICULARLY TRUE IN THE CASE OF EXCEPTIONS IN RBP CHAPTER AND PRINCIPLES ADDRESSED TO NATIONAL REGULATIONS. AFRICANS AND LATIN AMERICANS REMAINED AT ODDS ON LATTER ISSUE (AND POSSIBLY ALSD ON CODE'S LEGAL NATURE), ALTHOUGH LATINS SUCCEEDED IN VETOING G-77 ACCEPTANCE OF CONCEPT OF PRINCIPLES ADDRESSED TO NATIONAL REGULATIONS. ABSENCE OF MEXICAN DELEGATION AND LESS EFFECTIVE VENEZUELAN REPRESENTATION POINT TO LOWER PRIORITY GIVEN THE CODE, AT BEST, BY THESE TRADITIONALLY ACTIVIST COUNTRIES. OVERALL, G-77 SEEMED TO EVIDENCE AN INCREASED WILLINGNESS TO COMPROMISE ON SMALLER ISSUES. HOWEVER, IN A STATEMENT AT CONCLUDING PLENARY, G-77 EXPRESSED STRONG DISAPPOINTMENT AT SLOW PROGRESS OF NEGOTIATIONS, HIGHLIGHTING THE NATIONAL SOVEREIGNTY ISSUE AND ACCUSING B GROUP OF A REFUSAL TO NEGOTIATE SERIOUSLY. CHIEF IMPRESSION IS THAT DEVELOPING COUNTRIES ARE GROWING SKEPTICAL--AND TIRED--OF THE CODE EXERCISE, BUT HAVING COMMITTED THEMSELVES TO THIS OBJECTIVE WISH TO CONFIDENTIAL

SEE IT THROUGH. G-77 CAN BE EXPECTED, THEREFORE, TO PRESS FOR FULL AGREEMENT AT OCTOBER NEGOTIATING CONFERENCE, PROBABLY ALONG LINES OF A "ZEBRA CODE". B GROUP DOES NOT SEE SUCH AGREEMENT AS A REALISTIC POSSIBILITY; SOME MEMBERS (E.G., UK, FRG, SWEDEN) ARE RECEPTIVE TO IDEA OF A PHASED CONFERENCE TO CONTINUE DISCUSSIONS INTO 1978 IN WAYS WHICH WOULD AVOID POLITICAL LEVEL DECISIONS BY UNGA REVIEW COMMITTEE AND UNCTAD V. CHINA, WHICH PARTICIPATED FOR FIRST TIME IN WORKING GROUPS, MAINTAINED A BARELY VISIBLE PROFILE, AND CONFINED SUBSTANTIVE COMMENT TO SUPPORT--AT CONFERENCE'S END--FOR A NUMBER OF G-77 POSITIONS, INCLUDING CHARTER OF ECONOMIC RIGHTS AND DUTIES AND THE NEW INTERNATIONAL ECONOMIC ORDER. D GROUP (COMECON COUNTRIES) PRIVATELY INDICATED OPPOSITION TO A LEGALLY BINDING CODE AND OTHERWISE LIMITED ITSELF TO A CAMPAIGN IN FAVOR OF NON-DISCRIMINATION IN TECHNOLOGY TRANSFERS (E.G., NO EXPORT RESTRICTIONS). END ASSESSMENT.

3. NATIDNAL REGULATIONS. EXPERTS CONDUCTED ARDUOUS NEGOTIATIONS ON DIFFICULT ISSUE OF NATIONAL REGULATIONS BUT FAILED TO REACH ANY AGREEMENT ON THE CHAPTER. CHIEF

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

ISSUE IS REFUSAL OF G-77 TO ACCEPT THE IDEA OF SPECIFIC PRINCIPLES APPLICABLE TO NATIONAL REGULATION ON GROUNDS THAT SUCH WOULD INFRINGE THEIR SOVEREIGNTY. (77 LEADERSHIP INITIALLY ACCEPTED THE CONCEPT BUT LATER REVERSED ITSELF UNDER PRESSURE FROM LATINS; POSSIBILITY EXISTS, HOWEVER, FOR ACCEPTANCE OF SOME WATERED-DOWN PRINCIPLES AT NEXT IGGE OR NEGOTIATING CONFERENCE, ALTHOUGH G-77 ARE EXTREMELY SENSITIVE ON THIS I-SUE AS WELL AS ON ANY REFERENCE IN CODE TO POSSIBLE CONSTRAINTS IN GOVERNMENT ACTION.) B GROUP FLOATED A SLIGHTLY REVISED VERSION OF ITS PROPOSAL, PREVIOUSLY TABLED AT THE 4TH IGGE MEETING, WHICH ACCEPTS DETAILED LISTING OF REGULATORY MEASURES IN EXCHANGE FOR PRINCIPLES. G-77 ROUNDLY DENOUNCED

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PAGE 01 GENEVA 03052 02 OF 04 271500Z
ACTION EB-08

INFO OCT-01 IO-13 ISO-00 L-03 FRB-03 OMB-01 ITC-01
SP-02 USIA-06 AGRE-00 AID-05 CIAE-00 COME-00
INR-10 LAB-04 NSAE-00 OIC-02 SIL-01 STR-07
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R 271428Z FEB 78
FM USMISSION GENEVA
TO SECSTATE WASHDC 6483
INFO USMISSION USUN NEW YORK

C O N F I D E N T I A L SECTION 02 OF 04 GENEVA 03052

INFORMAL PAPER PRESENTED AT LAST IGGE BY INDIAN CHAIRMAN OF WORKING GROUP 1 WHO FELT COMPELLED TO PRESENT A PAPER MORE FAVORABLE TO G-77 AT CURRENT MEETING.

4. INTERNATIONAL COLLABORATION. EXPERTS AGREED ON A SURPRISINGLY CLEAR AND MODEST TEXT ON INTERNATIONAL COLLABORATION BUT DID NOT CONSIDER THE QUESTION OF INTERNATIONAL MACHINERY. HOWEVER, G-77 FLOATED AN ILL-DEFINED PROPOSAL FOR INSTITUTIONAL ARRANGEMENTS TO INCLUDE A "COMMISSION" FOR THE "SURVEILLANCE, MONITORING AND REVIEW OF THE IMPLEMENTATION OF THE CODE", AS WELL AS A SECRETARIAT "ORGANICALLY" LINKED TO UNCTAD. THE COMMISSION IS PROPOSED TO MEET BIANNUALLY AND TO REPORT TO THE UNCTAD TRADE AND DEVELOPMENT BOARD. HOWEVER,

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

A REVISION OF THE CODE WOULD NOT TAKE PLACE EARLIER THAN FIVE YEARS AFTER ITS ADOPTION. B GROUP WILL CONSIDER THE QUESTION AT ITS NEXT CAUCUS IN MAY. USDEL PROMISED A DISCUSSION PAPER ON THE SUBJECT OF INSTITUTIONAL ARRANGEMENTS AS WELL AS ONE ON PROCEDURAL/ ORGANIZATIONAL ASPECTS OF THE OCTOBER NEGOTIATING CONFERENCE.
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PAGE 02 GENEVA 03052 02 OF 04 271500Z

5. PRINCIPLES AND OBJECTIVES. IN AN IMPORTANT DEVELOPMENT, G-77 ACCEPTED CONCEPT OF A DISTINCTION BETWEEN PRINCIPLES AND OBJECTIVES OF THE CODE. THIS MOVE LED TO AGREEMENT ON A TEXT WHICH RECOGNIZES MUTUAL BENEFIT AS A PRINCIPLE OF THE CODE. DEVELOPING COUNTRIES, HOWEVER, CONTINUED TO RESIST OUR REFERENCES TO FREEDOM OF NEGOTIATIONS, AND RESPECT FOR INDUSTRIAL PROPERTY RIGHTS. MUCH WORK REMAINS ON THIS CHAPTER.

6. FIRST WEEK OF WORKING GROUP II WAS DEVOTED TO RESTRICTIVE BUSINESS PRACTICES WITH GROUP B'S MAJOR ACCOMPLISHMENT THE SUBMISSION OF A NEW TEXT FOR A CHAPEAU ON THE CHAPTER. LIMITED PROGRESS WAS ALSO MADE ON CONSOLIDATING THE BRACKETED TEXTS OF SOME OF THE PRACTICES AND GROUP B REPEATED ITS OBJECTIONS TO EXPANDING THE NUMBER OF PRACTICES BEYOND THE CURRENT 14. AFTER FOUR DAYS OF DISCUSSION THE FOLLOWING DRAFT CHAPEAU WAS AGREED UPON BY GROUP B AND SUBMITTED TO THE WORKING GROUPS:
QUOTE: IN ORDER TO AVOID UNREASONABLE RESTRAINTS OF TRADE ADVERSELY AFFECTING THE TRANSFER OF TECHNOLOGY, PARTICULARLY AS THESE AFFECT RECIPIENT COUNTRIES, PARTIES TO TECHNOLOGY TRANSFER TRANSACTIONS SHOULD REFRAIN FROM THE FOLLOWING PRACTICES IN LICENSING PATENTS OR KNOW-HOW, OR TRADEMARKS ASSOCIATED WITH PATENTS OR KNOW-HOW, UNLESS THE PRACTICE IS REASONABLE IN AN INDIVIDUAL CASE, TAKING INTO ACCOUNT ALL RELEVANT CIRCUMSTANCES, INCLUDING THOSE PREVAILING AT THE INCEPTION OF THE TRANSFER OF TECHNOLOGY ARRANGEMENT, AND SUBJECT TO THE JUSTIFICATIONS AND EXCEPTIONS SET FORTH IN THE CLAUSES DEFINING THE PRACTICES; RECOGNIZING THAT RESTRICTIONS FOR THE PURPOSE OF RATIONALIZATION OR REASONABLE AL-
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PAGE 03 GENEVA 03052 02 OF 04 271500Z

LOCATION OF FUNCTIONS BETWEEN PARENT AND SUBSIDIARY OR AMONG ENTERPRISES BELONGING TO THE SAME CONCERN WILL

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

NORMALLY BE CONSIDERED ACCEPTABLE UNLESS AMOUNTING TO
AN ABUSE OF A DOMINANT POSITION OF MARKET POWER WITHIN
THE RELEVANT MARKET, FOR EXAMPLE UNREASONABLE RESTRAINT
OF THE TRADE OF A COMPETING ENTERPRISE. UNQUOTE.
THE CHAPEAU INCORPORATES THE THREE US OBJECTIVES OF A
COMPETITION STANDARD, RULE OF REASON TEST, AND AN
EXCEPTION FOR INTRA-CORPORATE TRANSACTIONS. DUE TO THE
INSISTENCE OF THE FRENCH DELEGATION, SUPPORTED BY OTHER
DELEGATIONS FROM EC COUNTRIES, THE US AGREED TO DRAW
THE PRESENT LANGUAGE DESCRIBING THE PARENT/SUBSIDIARY
RELATIONSHIP IN THE CHAPEAU FROM THE EUROPEAN COURT OF
JUSTICE'S STERLING DRUG/CENTRAFARM DECISION. US
NEGOTIATION OF THE CHAPEAU'S WORDING WAS FURTHER
HAMPERED BY A NUMBER OF GROUP B COUNTRIES (E.G., NORDICS,
AUSTRALIA, CANADA) WHICH HAD STRICT INSTRUCTIONS TO HOLD
TO THE QUALIFYING PHRASES IN THE TEXT (I.E., "NORMALLY"
IN THE INTRA-CORPORATE EXCEPTION WORDING). THE US
DELEGATION DECIDED TO SUPPORT SUBMISSION OF THE ABOVE
TEXT AS THE BEST WHICH COULD BE DEVELOPED IF CHAPEAU
WAS TO BE TABLED AT THIS SESSION. IT WAS FELT FURTHER
DELAY COULD WEAKEN THE RESOLVE OF SEVERAL DELEGATIONS
ALREADY WAVERING IN THEIR SUPPORT OF THE BASIC IDEA OF
A CHAPEAU. AS A MATTER OF FACT, ALTHOUGH GROUP B
APPEARED UNITED IN ITS SUPPORT OF THE CHAPEAU VIS-A-VIS
THE OTHER GROUPS, SEVERAL GROUP B COUNTRIES VOICED THEIR
DIFFICULTIES, AT GROUP B MEETINGS, OF BEING ABLE UN-
RESERVEDLY TO ACCEPT THE CHAPEAU IN ITS PRESENT VERSION.
FOREMOST AMONG THOSE COUNTRIES WAS FRANCE, WHICH RELIED
ON ITS NATIONAL LAW TO OPPOSE INTRA-CORPORATE EX-
CEPTIONS, ALTHOUGH DURING PRIVATE DISCUSSIONS IT TURNED
OUT THAT FRANCE'S OPPOSITION WAS MORE POLITICAL IN NATURE
THAN BASED ON LEGAL CONSIDERATIONS. FIRST REACTIONS TO
THE CHAPEAU AMONG OTHER GROUPS WAS MIXED. GROUP D WAS

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PAGE 01 GENEVA 03052 03 OF 04 271509Z
ACTION EB-08

INFO OCT-01 IO-13 ISO-00 L-03 FRB-03 OMB-01 ITC-01
SP-02 USIA-06 AGRE-00 AID-05 CIAE-00 COME-00
INR-10 LAB-04 NSAE-00 OIC-02 SIL-01 STR-07
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FM USMISSION GENEVA

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

TO SECSTATE WASHDC 6484
INFO USMISSION USUN NEW YORK

C O N F I D E N T I A L SECTION 03 OF 04 GENEVA 03052

SURPRISINGLY FAVORABLE AND RAISED NO OBJECTIONS TO THE RULE OF REASON TEST OR INTRA-CORPORATE EXCEPTIONS. THEY DID EXPRESS A PROBLEM WITH RESTRICTING THIS CHAPTER TO LICENSING ARRANGEMENTS AND WERE TROUBLED BY THE "CENTRAFARM" WORDING DESCRIBING THE PARENT/SUBSIDIARY RELATIONSHIP. ON THE OTHER HAND, GROUP-77 CLAIMED A MORE FUNDAMENTAL OBJECTION TO THE INCLUSION OF A RULE OF REASON TEST IN THE CHAPEAU WHICH THEY FEARED WOULD LEAD TO CLAIMS FOR AN UNLIMITED NUMBER OF EXCEPTIONS. G-77 WAS EQUALLY CRITICAL OF AN INTRA-CORPORATE EXCEPTION. BOTH GROUPS PROMISED TO GIVE SPECIFIC COMMENTS ON THE CHAPEAU IN THE NEXT IGGE.

7. RESPONSIBILITIES/GUARANTEES. THE SECOND WEEK OF WORKING GROUP II DEALT WITH RESPONSIBILITIES/GUARANTEES CHAPTER OF THE CODE. THIS WAS THE FIRST TIME APART FROM THE PRELIMINARY DISCUSSIONS AT THE FOURTH IGGE THAT SUBSTANTIVE EXCHANGES AMONG THE GROUPS HAVE TAKEN PLACE IN THIS AREA. AFTER SOME WRANGLING ON PROCEDURE THE WORKING GROUP AGREED TO A METHOD OF WORK FOR THIS AND THE SIXTH SESSION OF THE IGGE IN WHICH CLAUSES OF THE CONFIDENTIAL

CONFIDENTIAL

PAGE 02 GENEVA 03052 03 OF 04 271509Z

VARIOUS DRAFT TEXTS WOULD BE DEALT WITH IN THE ORDER PRESENTED IN THE SECRETARIAT'S SYNOPTIC TABLE ON THE CHAPTER. IT WAS AGREED THAT THIS WOULD NOT PREJUDICE THE FINAL ORDER AND ARRANGEMENT OF THE CHAPTER. (GROUP-77 AND GROUP D REJECTED AN INITIAL GROUP B SUGGESTION TO ARRANGE THE ITEMS IN THE SYNOPTIC TABLE BY THE TYPE OF RESPONSIBILITY INVOLVED AND TO CLEARLY DEFINE EACH OF THESE CATEGORIES.) GROUP D SUBMITTED A RESTRUCTURING OF ITS TEXT ON THIS CHAPTER WHICH, THOUGH IT APPEARED AS A MORE BALANCED DOCUMENT, INCORPORATED A PECULIAR BREAKDOWN OF OBLIGATIONS ON THE BASIS OF THEIR "PRECONTRACTUAL" AND "CONTRACTUAL" NATURE AND PRESUMED MANY CLAUSES TO BE OF THE "IMPLIED WARRANTY" TYPE, WHICH DID NOT HAVE TO BE EXPRESSLY STATED IN AN AGREEMENT. US DEL WILL BE HAND-CARRYING THIS PAPER BACK TO WASHINGTON. THE GROUP-77 FAILED TO PRESENT A PROMISED REDRAFT OF ITS OWN DOCUMENT. OBSERVING THE METHOD OF WORK DESCRIBED ABOVE, THE WORKING GROUP, AFTER OFTEN SPIRITED DISCUSSION, PRODUCED TWO CLAUSES IN BRACKETED COMPOSITE TEXT DEALING WITH OBLIGATIONS RELATING TO THE TECHNOLOGY'S SUITABILITY AND ITS CONTENT. A THIRD

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

CLAUSE ON ACHIEVEMENT OF PREDETERMINED RESULTS WAS ALSO AGREED UPON IN COMPOSITE TEXT BY GROUP D AND THE G-77. THIS CLAUSE WAS NOT FAVORED BY GROUP B AND NO PROPOSALS WERE ADVANCED BY IT ON THIS SUBJECT.

8' PROCEDURAL QUESTION. B GROUP SELECTED A NEW SPOKESMAN (BIZEC, FRANCE) TO COORDINATE ITS WORK ON RESPONSIBILITIES OF ENTERPRISES. THE NEXT IGE (JUEN 26-JULY 7) WILL FOCUS ON THE FOLLOWING ISSUES: RBPS, RESPONSIBILITIES, SETTLEMENT OF DISPUTES, NATIONAL REGULATION AND DEFINITIONS. THE IGE MAY ALSO CONSIDER PRELIMINARILY THE CONFERENCE'S RULES OF PROCEDURE AND CONFIDENTIAL

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AGENDA. NEXT B GROUP CAUCUS IS SET FOR MAY 9-11 AT THE OECD.

9. TEXT OF USDEL PLENARY STATEMENT, FEBRUARY 24:
QUOTE:
I WOULD LIKE TO TAKE THIS OPPORTUNITY MERELY TO RECALL FOR THE INFORMATION OF THE DELEGATES AT THIS IGE THE SUBSTANCE OF A STATEMENT MADE BY THE U.S. REPRESENTATIVE AT THE UNITED NATIONS GENERAL ASSEMBLY DECEMBER 14, 1977 CONCERNING RESOLUTION A/C/2/L78. YOU MAY RECALL THAT IT WAS THIS RESOLUTION WHICH ESTABLISHED THE DATES FOR THE NEGOTIATING CONFERENCE, OCTOBER 16-NOVEMBER 10. THE RESOLUTION WAS ADOPTED BY CONSENSUS.
THE U.S. DELEGATE STATED INTER ALIA THAT MY GOVERNMENT STRONGLY SUPPORTS THE OVERALL OBJECTIVES OF STRENGTHENING THE TECHNOLOGICAL CAPABILITY OF DEVELOPING COUNTRIES. HE EXPRESSED, IN PARTICULAR, OUR SINCERE HOPE THAT THE ONWARD WORK IN 1978 CONCERNING A CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY WOULD ACHIEVE AGREEMENT.
THE STATEMENT NOTED, HOWEVER, THAT MY GOVERNMENT IS CONCERNED THAT THUS FAR IT HAS NOT BEEN POSSIBLE TO ACHIEVE MORE EXTENSIVE AGREEMENT ON THE CODE'S BASIC ISSUES AT THE EXPERT LEVEL. GIVEN THE DIFFICULT NATURE OF THESE ISSUES, AND THE LARGE MEASURE OF DISAGREEMENT WHICH REMAINS, IT WAS SUGGESTED THAT SCHEDULING A FULL NEGOTIATING CONFERENCE IN OCTOBER 1978 WAS PREMATURE AT THIS POINT IN TIME. UNLESS SUBSTANTIALLY GREATER AGREEMENT WAS POSSIBLE IN ADVANCE OF THE OCTOBER DATE, SUCH A CONFERENCE, WE FELT, MIGHT ACHIEVE ONLY LIMITED RESULTS AND THUS COULD SET BACK THE PROSPECTS FOR AGREEMENT ON A CODE WE ALL SEEK. MY GOVERNMENT THEREFORE EXPRESSED A FORMAL RESERVATION ON THE DATES OF THE CONFERENCE. WE NOTED THAT OUR PARTICIPATION WOULD DEPEND UPON AN ASSESSMENT AS TO WHETHER AN ADEQUATE BASIS THEN EXISTS FOR A SUCCESSFUL CONFERENCE.

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

Sheryl P. Walter Declassified/Released US Department of State EO Systematic Review 20 Mar 2014

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ACTION EB-08

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R 271428Z FEB 78
FM USMISSION GENEVA
TO SECSTATE WASHDC 6485
INFO USMISSION USUN NEW YORK

C O N F I D E N T I A L SECTION 04 OF 04 GENEVA 03052

I WANT TO MAKE CLEAR THAT THIS STATEMENT WAS MADE ONLY
ON BEHALF OF THE U.S. THIS STATEMENT SHOULD NOT BE READ
AS A JUDGEMENT BY MY GOVERNMENT THAT ANY GROUP HAS BEEN
UNWILLING TO NEGOTIATE SERIOUSLY OR TO MAKE EVERY EFFORT
TO REACH SATISFACTORY COMPROMISES. RATHER IT REFLECTS
OUR VIEW THAT THE ISSUES AT HAND ARE SO FUNDAMENTAL THAT
IT WOULD HAVE BEEN PRUDENT TO RETAIN FLEXIBILITY ON THE
TIMING OF THE CONFERENCE.
I ALSO WANT TO MAKE CLEAR MOST EMPHATICALLY THAT THESE
WORDS IN NO WAY IMPLY ANY SLACKENING OF WILL BY MY
GOVERNMENT TO WORK DILIGENTLY FOR THE MAXIMUM POSSIBLE
AMOUNT OF AGREEMENT. THIS WE WILL CONTINUE TO DO IN
THE VERY GENUINE HOPE THAT A SUCCESSFUL CONFERENCE
WILL RESULT FROM THE WORK OF THE EXPERTS. AT THIS IGE
SESSION, WE HAVE MADE COMMENDABLE PROGRESS ON TWO CHAPTERS
OF THE CODE. WE TRUST THAT WE WILL BE ABLE TO MAINTAIN
THIS PACE OF WORK AT THE NEXT IGE. FOR IN THIS WORK, WE
ALL SHARE A COMMON GOAL -- TO PRODUCE A CODE WHICH WILL
FACILITATE THE TRANSFER OF TECHNOLOGY AND SERVE TO
EXPAND TECHNOLOGICAL FLOWS, PARTICULARLY TO DEVELOPING
COUNTRIES, ON FAIR AND MUTUALLY SATISFACTORY TERMS.
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VANDEN HEUVEL

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20 Mar 2014
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